

Youth Court Information Paper Indigent Parent Legal Representation in TPR Proceedings

When the court deems necessary, the court may provide a court-appointed attorney to represent indigent parents in termination of parental rights cases (hereinafter referred to as TPR). The court determines the need to appoint legal counsel to represent indigent parents in TPR proceedings on a case by case basis. This information paper reviews the jurisprudence that recognized that indigent parents possess a constitutionally protected liberty interest in the custody and care of their children in government-initiated TPR cases.

Jurisprudence reflects that in *M.L.B. v. S.L.J.*, 519 U.S. 102, 103 (1996), the United States Supreme Court established that the rights of parents to the custody of their children constitutes a constitutionally protected liberty interest and that due process may require the appointment of legal counsel for indigent parents in TPR proceedings. Mississippi statutory law, as established in Mississippi Code Annotated section 43-21-557(e), currently fails to provide a state statutory right to a “free” court-appointed lawyer for indigent parents in child protection cases.¹ Jurisprudence reflects however that the right to court appointed counsel for indigent parents in TPR cases arises from the U.S. Constitution. *See Pritchett v. Pritchett*, 161 So. 3d 1106, 1110-11 (¶¶10-11) (Miss. Ct. App. 2015) (setting forth analysis to determine if due process requires court-appointed legal representation for indigent parents in TPR cases).

Mississippi courts have long recognized the courts’ statutory duty to advise youth and their parents of their entitlement to legal representation. *See In Interest of I.G.*, 467 So. 2d 920, 922 (Miss. 1985); *Hopkins v. State*, 209 So. 2d 841, 843 (Miss. 1968); *In Interest of Long*, 184 So. 2d 861, 862 (Miss. 1966). There are currently 5 counties that have parent legal representation pilot programs, and these programs are largely supported by matching funds provided by the Casey Foundation.² The Mississippi pilot programs reflect that parent representation facilitated parent engagement in the child protection proceedings, increases the chance of reunification, and helps reduce the time required to achieve permanency for the child. Reducing the time required to achieve permanency benefits both the child and their family, and it reduces the costs born by the state. In addition to being constitutionally required, the administration of justice is improved significantly where legal representation is provided to indigent parents in TPR cases.

¹ See Uniform Rule of Youth Court Practice 22 (relative to adjudicatory hearing). *See also* Miss. Code Ann. § 43-21-557.

² Adams, Forrest, Harrison, Rankin, and Hancock counties currently have parent legal representation pilot programs.

The law as established by the U.S. Supreme Court provides that the rights of parents in their relationship with their children has been recognized as a constitutionally protected liberty interest.³ The U.S. Supreme Court, as well as the Mississippi Supreme Court, have established that due process may require free court-appointed legal representation for indigent parents in TPR proceedings as follows: where the case is particularly complex; where potential criminal charges exist; and/or where the procedural due process protections are lacking, thereby creating a high risk of error in the loss of parental rights.⁴ Most are familiar with the requirement that the court appoint legal counsel to indigent parents in TPR cases where the cases are particularly complex or potential criminal charges exist. This informational paper addresses the third basis—wherein the court may be required to appoint legal counsel for indigent parents in TPR cases due to constitutional due process protections. As provided in *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 36 (1981), the U.S. Supreme Court jurisprudence initially did not recognize a parent’s right to the custody and care of his or her child as a constitutionally protected liberty interest since no deprivation of physical or constitutionally protected liberty was at stake. The *Lassiter* case has been applied to determine whether the presumption against appointment of counsel was overcome due to the complexity of the case or due to potential criminal charges arising out of the conduct involved in the TPR case. In applying *Lassiter*, the Mississippi Supreme Court established the determinative difference test to determine whether the presumption had been overcome. See *K.D.G.L.B.P. v. Hinds Cnty. Dep’t of Human Servs.*, 771 So. 2d 907, 910 (Miss. 2000).

Fifteen years after the U.S. Supreme Court’s opinion in *Lassiter*, the U.S. Supreme Court addressed Mississippi’s youth court structure in reviewing a case where an indigent mother sought in forma pauperis status and free transcripts for an appeal of the termination of her parental rights. In the 1996 opinion of *M.L.B. v. S.L.J.*, 519 U.S. 102, 103 (1996), the U.S. Supreme Court found Mississippi’s labeling of TPR cases as civil cases posed no bar to its determination that parents’ interest in their relationship with their children was a constitutionally protected liberty interest. The Court also found Mississippi’s youth court system lacking in procedural safeguards to protect the fundamental rights of the parents in their relationships with their children. *Id.* at 104-105; see also Miss. Code Ann. § 43-21-

³ See *M.L.B. v. S.L.J.*, 519 U.S. 102, 103 (1996).

⁴ See also Miss. Code Ann. §§ 93-15-101 through 111 (Mississippi Termination of Rights of Unfit Parents law); Compare adjudication in juvenile delinquency cases and see *In re J.P.*, 151 So. 3d 204, 209 (¶12) (Miss. 2014) (parents and guardians must be summonsed as required by statute); *K.D.G.L.B.P. v. Hinds Cnty. Dep’t of Human Servs.*, 771 So. 2d 907, 910 (Miss. 2000); *In Interest of Dennis*, 291 So. 2d 731, 734 (Miss. 1974) (“[A] child may not be committed to an institution without a petition and an adjudicatory hearing,” and interested parties must be afforded due process).

107(2)-(3) and Miss. Code Ann. § 43-21-111 (appointed youth court referees).⁵ The Court further explained “[w]hen deprivation of parental status is at stake, . . . counsel is sometimes part of the process that is due.” *Id.* at 123.

In turning to address why terminating the parental rights of an indigent parent raises procedural due process concerns, notice that our youth courts are largely served by part-time youth court referees with minimal staff support and with minimal resources. Mississippi has 82 counties, but only 22 of those counties have an elected county youth court judge. The senior chancellor in a district appoints the youth court referee to preside over youth courts in most of the remaining 82 counties. Most youth court referees also juggle a busy private law practice. In *MLB*, the U.S. Supreme Court stated that it was not impressed with Mississippi’s attempt to save money on its youth court system and found the due process insufficient to protect the rights of indigent parents in a TPR proceeding that was appealed. *M.L.B.*, 519 U.S. at 121.

In looking to how our sister states have satisfied the demands of due process in TPR proceedings, the approach taken by Texas is instructive. Texas recently enacted a state statute authorizing court-appointed representation for indigent parents. The Texas statute, however, does not require the court to appoint attorneys for all indigent parents, but allows the youth court the “discretion” to determine the need for such on a case-by-case basis. This case-by-case approach taken by the Texas parent-representation statute satisfies the due process concerns raised by U.S. Supreme Court jurisprudence. This case-by-case approach is embraced by Mississippi Supreme Court jurisprudence wherein the Mississippi Supreme Court recognizes that court-appointed legal representation for indigent parents in TPR cases is warranted where the case is particularly complex, where criminal charges exist, or where the risk of error is high due to deficiencies in procedural due process.⁶

Texas answered the question as to when in the proceeding should the court appoint legal representation for indigent parents in TPR cases. As stated, Texas enacted a statutory law that allows, but does not require, a court to appoint an attorney to represent a parent for a limited duration starting from the date that the court issues the temporary restraining order

⁵ Miss. Code Ann. § 43-21-205 (Fees in youth court cases originating in petitions are to be paid by the county as provided by law in other cases).

⁶ See recent cases of *Reasor v. Jordan*, 110 So. 3d 307, 310-11 (¶¶9-13) (Miss. 2013) (Father not entitled to court-appointed legal counsel in status conference hearing merely to determine child support arrearages); *Green v. Mississippi Dep't of Human Servs.*, 40 So. 3d 660, 664 (Miss. Ct. App. 2010) (Finding no due process violation in failure to appoint legal counsel for indigent parents. Court acknowledged case-by-case determination and found no showing of determinative difference).

(or order of attachment of a child) until the court makes the determination of indigence prior to commencement of the full adversary hearing. The new Texas law allows the court to dismiss the attorney before commencing the adversary hearing if the court determines the following: (1) that the parent is not indigent; (2) that the parent cannot be located, and (3) the attorney files a written summary of the attorney's efforts to identify and locate the parent. The statute also delineates what may be considered by the court in determining whether a parent is indigent, such as a parent's income, source of income, assets, property owned, benefits paid by federal, state, or local public assistance program, outstanding obligations, necessary expenses, and the number and age of dependents. In sum, the Texas statute allows the court flexibility in determining whether to appoint an attorney for indigent parent in child protection cases, but gives the court the right to do so when appropriate.

Additionally, Texas and other states argue that implementing parent legal representation for indigent parents in TPR cases assists youth courts in the following: earlier identification of services needed (front loading services) by the parent and children; accessing services earlier in the proceedings; implementing a comprehensive plan, and with voluntary crisis intervention. Other states, like Texas, have concluded that providing parent representation encourages parents to become a part of the solution and reduces the time frame required to achieve permanency. Texas determined that the front loading of services in child protection cases requires sufficient judicial assets to provide docketing and scheduling, as well as hearings to order services needed and to determine the status of services needed or provided thus far in the case. Texas has found that the court-appointed lawyer for the indigent parent assists the court by providing a conduit for voluntary crisis intervention and by requesting hearings to alert the court to needed services and strategically requesting identified services earlier in the case. In addition to providing a safeguard to the constitutionally protected rights of the parents in the custody of their children, Texas provides that the court-appointed legal representation for indigent parents also assists youth courts in TPR cases to improve the administration of justice and thereby enables the court to reduce the time from removal of the child from home to permanency.

Judge Virginia Carlton
Co-Chair
Mississippi Children's Justice Commission